Filed 8/10/04 North. Cal. Collection Serv. v. Farinha CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

NORTHERN CALIFORNIA COLLECTION SERVICE, INC., Plaintiff and Respondent, v. STEVEN F. FARINHA, Defendant and Appellant.	C045517 (Super. Ct. No. SCV0014594)

Defendant Steven F. Farinha appeals from an order denying his motion to set aside default and default judgment. (Code Civ. Proc., § 473.) He contends he was denied due process because the summons failed clearly to show he was sued by plaintiff Northern California Collection Service, Inc. (NCCS), as an individual defendant. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2002, NCCS filed a civil complaint against Farinha, Inc., dba Paragon Construction, Paragon Management Services Company, A & A Electrical-Mechanical, and Steven F.

Farinha, as an individual. In mid-January 2003, it served three summonses on Farinha: one "on behalf of . . . A & A Electrical Mechanical," one "on behalf of . . . Paragon Management Services Company," and one -- at issue here -- "as an individual defendant" and "on behalf of . . . Farinha, Inc., DBA Paragon Construction." Defendant failed to appear and answer, and on February 20, 2003, the clerk entered default and default judgment against defendant for $49,686.83.

Nearly six months later, Farinha moved to set aside the default and default judgment pursuant to Code of Civil Procedure section 473, subdivision (b) "on the grounds that [they were] taken against [him] by reason of the mistake, inadvertence, surprise, or excusable neglect of Defendant."

Farinha stated, in a declaration filed in support of the motion, he was the president of Farinha, Inc., which conducted business as Paragon Construction and A & A Electrical. He had contacted his attorney, John P. Garcia, concerning "some papers" he received in connection with the litigation. Farinha understood Garcia would contact the attorney for NCCS in order to set aside the default. He subsequently received notice from his bank. It said his individual account had been attached. Farinha stated, to the best of his knowledge, the debt was a debt of Farinha, Inc., not his personal debt.[1]

---

[1] We disregard the document attached as exhibit A to NCCS's brief which is directed at this issue. It is not part of the record on appeal.

Garcia stated, in his declaration, he telephoned Steven D. Cribb, the attorney for NCCS, after Farinha contacted him in February 2003. Garcia declared NCCS agreed in the telephone conversation to set aside the default entered against Farinha individually. On February 24, 2003, Garcia drafted and mailed a stipulation to that effect, an answer to the complaint, and a cover letter to Cribb. Garcia did not receive a response, but "merely believed that the 'press of business' delayed the execution of the Stipulation by Mr. Cribb." Meanwhile, he instructed Farinha to search for documents to show the debt claimed by NCCS was a debt of the corporation and not his individual debt. Sometime later, Garcia learned NCCS had attached Farinha's bank account. Farinha brought Garcia a copy of the memorandum of costs after judgment. At that juncture, on July 8, 2003, Garcia wrote Cribb asking whether NCCS had obtained a judgment against Farinha. He referenced his earlier letter and stipulation. On July 9, 2003, Cribb's office confirmed that NCCS had obtained judgment in the current amount of $52,231.54 and suggested that Farinha make arrangements to pay off the judgment.

NCCS opposed Farinha's motion to vacate judgment. It argued Farinha offered no explanation for his failure to timely file responsive pleadings. The motion addressed only Farinha's unjustified delay of almost six months in seeking relief from default even though he knew of the default in February 2003. Attorney Cribb filed a declaration acknowledging Garcia's telephone call on February 23, 2003. However, Cribb stated he

did not agree during the phone conversation or at any other time to stipulate to set aside the default. "The stipulation defendant sent the next day was not requested or agreed upon by the plaintiff."[2]

The trial court continued the hearing on Farinha's motion and ordered him to "file a supplemental declaration stating why he did not timely answer the complaint . . . ." Farinha explained, in the supplemental declaration, he was served with three copies of the same summons and complaint in mid-January 2003. One summons identified him being served "[a]s an individual defendant on behalf of Farinha, Inc., DBA Paragon Construction." Farinha stated he was president of Farinha, Inc., a now defunct corporation. He continued, "Since it appeared that I was not being served except as my capacity as an officer of the Farinha, Inc. business, I merely put the documents away and did not think to give them to my attorney . . . ." He contacted his attorney only after receiving a copy of the request for entry of default judgment around February 20, 2003, "which appeared to be requesting [his] default along with the default of Farinha, Inc."

---

[2] Cribb's declaration does not explain his lack of professional courtesy in failing promptly, or at all, to clarify what may have been a misperception of Garcia. He merely waited and quietly secured default judgment against Farinha at what he perceived to be the appropriate time.

The trial court denied Farinha's motion to set aside the default and default judgment on grounds he failed to show good cause for his failure to respond. This appeal ensued.

DISCUSSION

Farinha does not challenge as an abuse of discretion under Code of Civil Procedure section 473, subdivision (b), the trial court's ruling he failed to show good cause for his failure to respond. Instead, he argues for the first time on appeal the summons was insufficient for due process purposes because it was "vague as to who [was] being served and . . . not sufficiently clear to comply with 'due process' requirements." Dealing loosely with the facts, Farinha represents the summons identified the party being served "'as an individual defendant on behalf of Farinha, Inc. DBA Paragon Construction.'" There is no merit in Farinha's argument.

We begin by acknowledging the question of personal jurisdiction is properly before us. "A party may not present a new theory for the first time on appeal that '. . . contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial. . . .' [Citations.] An exception has been recognized where the theory presented for the first time on appeal involves only a legal question determinable from facts which are not only uncontroverted in the record but could not be altered by the presentation of additional evidence. [Citations.]" (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 812.) This includes questions of jurisdiction raised for the first time on

appeal. (*Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 518.) "Such questions of jurisdiction are never waived . . . ." (*Ibid.*)

Turning to the merits, we conclude service complied with the notice requirements of Code of Civil Procedure section 412.30, which reads:

"In an action against a corporation or an unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: 'To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure).' *If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association.* [¶] If such notice does not appear on the copy of the summons served, no default may be taken against such corporation or unincorporated association or against such person individually, as the case may be." (Italics added.)

Here, the summons, a mandatory form adopted by the Judicial Council, expressly specified, in the conjunctive, that NCCS was serving Farinha in two capacities: first, as an individual

defendant; *and*, second, "on behalf of . . . Farinha, Inc, DBA Paragon Construction." Because Farinha was properly served as an individual, the trial court had jurisdiction over him and, thus, did not err in denying his motion to set aside the default and default judgment that had been entered against him personally.

DISPOSITION

The order is affirmed.

SCOTLAND, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.